Supreme Court, U.S.
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No. 04-____

IN THE

Supreme Court of the United States

VLADIMIR RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the imposition, prior to *United States v. Booker*, 125 S. Ct. 738 (2005), of a sentence under the United States Sentencing Guidelines that exceeded the maximum sentence supported by the facts found by the jury or admitted by the defendant may presumptively be corrected on review for plain error, or whether such an unconstitutional sentence is reversible plain error only in the rare case in which there is affirmative evidence, such as a statement by the trial court, that the court would have imposed a lighter sentence if not bound by the Guidelines.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below are contained in the caption of the case.

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INTRODUCTION

Last Term, in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), this Court held that under the State of Washington's mandatory sentencing guidelines system, it violated the Sixth Amendment to impose a sentence above the maximum guidelines sentence supported by the facts found by the jury or admitted by the defendant. In *United States v. Booker*, 125 S. Ct. 738 (2005), this Court extended that holding to the United States Sentencing Guidelines. The Court noted that its decision in *Booker* was applicable to all cases on direct review, and expressly recognized that "prudential doctrines," such as "the 'plain-error' test," would play an important role in applying it to such cases. *Id.* at 769. Barely one month after that decision, the Circuits have fallen into a sharp three-way conflict in applying that mandate. The Third, Fourth, Sixth, and Ninth Circuits have followed a rule under which a sentence longer than the maximum Guidelines sentence justified by the facts found by the jury or admitted by the defendant almost always constitutes plain error requiring resentencing. The First and Eleventh Circuits have adopted a rule under which such sentences almost never constitute plain error. And the Second Circuit has adopted a third approach: remanding in every case to ask the district court to make the plain error determination.

This conflict affects a massive number of cases, and concerns an important issue that is squarely and cleanly presented here. Accordingly, petitioner submits that this Court's review is warranted.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is not yet reported in the *Federal Reporter*, but is available at 2005 WL 272952.

JURISDICTION

The court of appeals entered judgment on February 4, 2005. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition at pages 27a-33a.

STATEMENT OF THE CASE

A. The district court proceedings

Petitioner was convicted by a jury in the Middle District of Florida of conspiring to distribute and to possess with intent to distribute, and with possessing with intent to distribute, "a detectable amount" of 3,4-methylenedioxy-methamphetamine, also known as MDMA or Ecstasy, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C), and 18 U.S.C. § 2. No specific quantity of MDMA was alleged in the indictment, and the jury was not asked to make any determination as to quantity.

At sentencing, on May 10, 2004, the parties contested the quantity of MDMA for which petitioner was responsible under the United States Sentencing Guidelines. Petitioner admitted involvement in transporting 2,000 MDMA pills from Miami to Tampa, and contended that he was responsible only for that amount, or, at a maximum, for the 3,050 MDMA pills introduced into evidence at trial. The Government contended that he was responsible for approximately 30,000 pills. The only evidence supporting the Government's contention was the trial testimony of a narcotics dealer who had continued to sell drugs while purporting to cooperate with the Government, and who the Government conceded at trial was "notorious," "a thief," and

"a confidential informant who went bad."[1] Dec. 10, 2003 Trial Tr., at 136. Nonetheless, and despite polygraph evidence supporting petitioner's position, the district court credited the testimony of the cooperator and found, by a preponderance of the evidence, that petitioner was responsible for 30,000 MDMA pills.

Based on this judge-made finding, the district court determined that petitioner's offense level under the Sentencing Guidelines was 30, which, coupled with petitioner's lack of any prior criminal record, produced a sentencing range under the Guidelines of 97 to 121 months. *See* Pet. App. 10a & n.4. Had petitioner been held responsible for only the 2,000 pills he admitted transporting, or even the 3,050 pills in evidence at trial, his offense level would have been 26, and the accompanying range would have been 63 to 78 months. The district judge sentenced petitioner to 109 months' imprisonment, observing that he was selecting "the middle of the guideline range." May 10, 2004 Sentencing Tr., at 50.

B. The court of appeals' decision

On June 24, 2004, after the filing of petitioner's notice of appeal, this Court issued its decision in *Blakely v. Washington*, 124 S. Ct. 2531, striking down the State of Washington's mandatory sentencing guidelines system under the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

On appeal, petitioner argued that his sentence should be reversed, because (1) the district court had clearly erred in crediting the informant's testimony and concluding that petitioner was accountable for 30,000 MDMA pills; and (2) under *Blakely* and *United States v. Cotton*, 535 U.S. 625 (2002), the district judge had plainly erred in sentencing him

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[1] The cooperating witness testified that petitioner had made "10, 12, 13" trips transporting MDMA. The sole corroborating witness, another cooperator, testified to three or four such trips.

to a term of imprisonment longer than the maximum sentence that could be justified under the Sentencing Guidelines based on the facts alleged in the indictment and found by the jury or admitted by petitioner.[2] Petitioner noted that using the drug quantity to which he admitted, his Guidelines sentencing range would have produced a maximum sentence of 78 months, more than two-and-a-half years shorter than the sentence he received.

On January 12, 2005, this Court issued its opinion in *United States v. Booker*, 125 S. Ct. 738, extending the holding of *Blakely* to the federal Sentencing Guidelines. The court of appeals subsequently ordered supplemental briefing addressing whether, in light of *Booker*, the sentence imposed by the district court constituted plain error. In that supplemental briefing, petitioner argued that the increase in his sentence resulting from the district court's drug quantity findings was plain error, relying principally on *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005), the first published court of appeals decision addressing whether *Booker* error was plain error.

On February 4, 2005, the Eleventh Circuit issued an opinion affirming petitioner's sentence. The court began by upholding the district judge's factual determination that petitioner was responsible for approximately 30,000 MDMA pills. While acknowledging that there were several reasons to doubt the credibility of the informant whose testimony provided the basis for the enhanced drug quantity, Pet. App. 10a, the court of appeals ruled that the district court's credibility determination was not clearly erroneous,

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[2] Recognizing that the Eleventh Circuit had held, prior to the time petitioner's initial brief was filed, that the Sentencing Guidelines were not unconstitutional under *Blakely* (*United States v. Reese*, 382 F.3d 1308 (11th Cir. 2004)) and that *Blakely* errors did not constitute plain error (*United States v. Duncan*, 381 F.3d 1070 (11th Cir. 2004)), petitioner raised the *Blakely* issue "pending the Supreme Court's determination of the applicability of *Blakely* to the federal guidelines."

reasoning that "[w]here the factfinding resolves a swearing match of witnesses, the resolution will almost never be clear error." Pet. App. 8a.

The court of appeals then addressed the challenge under *Blakely* and *Booker* and held that the imposition of a sentence above the maximum Guidelines sentence justified by the facts found by the jury or admitted by the defendant does not constitute plain error. The court recognized that "three other federal courts of appeals"—the Second, Fourth, and Sixth Circuits—"have reached results different from our own in regard to whether *Booker* error is plain error," but pronounced itself "unpersuaded" by the other courts' opinions. Pet. App. 17a. (Since the Eleventh Circuit's decision, three additional Circuits, the First, Third, and Ninth, have addressed the issue. As detailed below, the First Circuit aligned itself with the Eleventh, while the Third and Ninth Circuits have adopted an opposing view.)[3]

The court began its analysis by identifying *Booker*'s holding as that "the Sixth Amendment right to trial by jury is violated where *under a mandatory guidelines system* a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." Pet. App. 11a (emphasis in original). Then, noting that petitioner had not raised the *Blakely* issue in the district court, the court of appeals set forth the familiar four-part test for plain error first described in *United States v. Olano*, 507 U.S. 725, 732 (1993): The appellant must show "'(1) error, (2) that is plain, and (3) that affects substantial rights," and, "'[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously

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[3] Two other circuits, the Eighth and Tenth, have decided to move directly to en banc consideration of the issue, without any initial panel ruling. *See United States v. Gonzalez-Huerta*, No. 04-2045 (10th Cir.) (to be argued Mar. 7, 2005); *United States v. Pirani*, No. 03-2871 (8th Cir.) (to be argued Mar. 9, 2005).

affects the fairness, integrity, or public reputation of judicial proceedings.'" Pet. App. 12a (quoting *Cotton*, 535 U.S. at 631).

The court observed that the first two prongs of the test were satisfied: There was error under *Booker* because petitioner's "base offense level, guidelines range, and sentence" were "enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by the jury," under a mandatory sentencing guidelines system; and the error was plain—even though not plain at the time of sentence—because "'it is enough that the error be plain at the time of appellate consideration.'" Pet. App. 12a-13a (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

The court held that the third prong, however—which requires a showing that the error "affected substantial rights," *i.e.*, that in the absence of the error there would have been a "reasonable probability" of a different result, Pet. App. 13a—had not been met. The court reached this conclusion by redefining the "error" being analyzed. Because *Booker* allowed the Sentencing Guidelines to continue to apply in advisory fashion, the court of appeals reasoned, the error in pre-*Booker* sentencings "is not that there were . . . enhancements based on facts found by the judge that were not admitted by the defendant or established by the jury verdict," but rather only the use of such enhancements "in a mandatory guidelines system." Pet. App. 15a. Accordingly, the court of appeals stated, the proper inquiry in applying the third plain-error prong is "whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." Pet. App. 17a.

Observing that "we don't know" what would have happened if the district court had treated the Guidelines as merely advisory—the district judge "might have given

Rodriguez a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence," *id.*—the court concluded that it was bound by this Court's decision in *Jones v. United States*, 527 U.S. 373 (1999), to find no plain error. According to the court of appeals, *Jones* mandates that where it is "uncertain or indeterminate" what the result would have been in the absence of error, "the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." Pet. App. 17a (citing *Jones*, 527 U.S. at 394-95).

The court thus treated *Jones* as establishing a rule that where a reviewing court is unable to predict what result the district court would have reached in the absence of error, the error does not "affect substantial rights" within the meaning of the test for plain error. Stated another way, the court ruled that in the case of a Sixth Amendment violation under *Booker*, there can be no plain error except in the rare case in which the district court gave some affirmative indication that it would have imposed a lower sentence if not bound by the Guidelines.

Accordingly, the court held that petitioner had failed to satisfy the third prong of the plain error test, and affirmed the judgment of the district court.

REASONS FOR GRANTING THE PETITION

In concluding the remedial portion of its opinion in *United States v. Booker*, this Court expressed its expectation that in applying the holding of *Booker* to all cases on direct review, "reviewing courts [would] apply ordinary prudential doctrines," such as "whether the issue was raised below and whether it fails the 'plain-error' test." 125 S. Ct. at 769. Barely one month after that decision, the Circuits have fallen into a square and rapidly growing conflict in applying that mandate to the massive backlog of cases in the courts of appeals awaiting this Court's decision in *Booker*. One approach, followed by four Circuits, would find plain error in almost every case in which a defendant received a

sentence longer than the maximum Guidelines sentence justified by the facts found by the jury or admitted by the defendant. Another, articulated by two Circuits, including the court below, would adopt a rule under which such error can rarely constitute plain error. And a third approach, adopted by yet another Circuit, steers a middle course, remanding in every case to ask the district court to make the plain error determination.

This conflict affects an extraordinary number of cases, and concerns an important issue that is squarely and cleanly presented by this case. Accordingly, petitioner submits that this case merits plenary review by this Court.

I. THERE IS A CLEAR AND GROWING CONFLICT ON THE PROPER DISPOSITION OF CLAIMS OF PLAIN ERROR UNDER *BOOKER*

In the short time since this Court's decision in *Booker*, the Circuits have been thrown into conflict over the recurring question whether the imposition, under the pre-*Booker* mandatory Sentencing Guidelines regime, of a term of imprisonment longer than the maximum sentence authorized under the Sentencing Guidelines by the facts found by the jury or admitted by the defendant constitutes plain error requiring a remand for resentencing. The focal point of that conflict has been the third prong of the traditional plain error test—*i.e.*, whether *Blakely*/*Booker* error is deemed to have affected the defendant's "substantial rights." The Eleventh Circuit, recently joined by the First Circuit, has adopted a rule under which such errors will almost never result in resentencing; the Third, Fourth, Sixth, and Ninth Circuits have held that such errors will almost always result in resentencing; and the Second Circuit has held that the district court in each case must determine whether resentencing is appropriate.

In this case, the Eleventh Circuit, while recognizing that petitioner's sentence was "error" that was "plain" under

Booker, ruled that a defendant cannot establish an effect on substantial rights from such an error in the absence of affirmative evidence that the district judge, had he or she known that the Guidelines range was not binding, would have imposed a shorter sentence. Pet App. 17a, 19a, 22a. Without such evidence, the court reasoned, "[w]e just don't know" the effect of the error, and the defendant "has not met his [third-prong] burden of showing that his substantial rights have been affected." Pet. App. 17a. Because affirmative evidence of what the district court would have done if it had predicted that the Guidelines would be treated as advisory will almost never exist,[4] the Eleventh Circuit's ruling amounts to a virtual per se rule against resentencing in the case of *Booker* error.

Similarly, the First Circuit, expressly disagreeing with cases from other Circuits, *see United States v. Antonakopoulos*, No. 03-1384, slip op. at 20-21 (1st Cir. Feb. 22, 2005), *available at* http://www.ca1.uscourts.gov

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[4] This is particularly true with respect to sentences imposed before *Blakely*, because the law was settled in every circuit that the Sentencing Guidelines were constitutional. *See, e.g., United States v. Casas*, 356 F.3d 104, 127-28 (1st Cir.), *cert. denied*, 124 S. Ct. 2405 (2004); *United States v. Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), *cert. denied*, 124 S. Ct. 1185 (2004); *United States v. Parmelee*, 319 F.3d 583, 591-92 (3d Cir. 2003); *United States v. Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), *cert. denied*, 537 U.S. 936 (2002); *United States v. Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2190 (2004); *United States v. Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States v. Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004), *vacated*, 2005 WL 124002 (U.S. Jan. 24, 2005); *United States v. Banks*, 340 F.3d 683, 684-85 (8th Cir. 2003); *United States v. Ochoa*, 311 F.3d 1133, 1134-36 (9th Cir. 2002); *United States v. Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), *cert. denied*, 537 U.S. 1063 (2002); *United States v. Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003); *United States v. Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003). Accordingly, district courts had no reason to address what sentence they might impose if the Guidelines were struck down. Even after *Blakely*, no Circuit anticipated the sentencing process set forth in the remedy portion of *Booker*.

/pdf.opinions/03-1384-01A.pdf/, has joined the Eleventh Circuit, holding that "the defendant must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable to the defendant under the new 'advisory Guidelines' *Booker* regime." *Id.* at 11; *see also id.* at 25 (requiring an affirmative showing based on statement by district judge or other "facts of the case").

In contrast, four Circuits—the Third, Fourth, Sixth, and Ninth—have reached precisely the opposite conclusion. In *United States v. Hughes*, the Fourth Circuit ruled that the district court's imposition of a sentence above the Guidelines maximum justified by the facts found by a jury, without more, constituted reversible plain error, even where "[t]he record does not provide any indication of what sentence the district court would have imposed had it . . . treat[ed] the guidelines as merely advisory." 396 F.3d at 381 n.7. The court held that the third-prong "substantial rights" test was satisfied by the fact that the defendant's sentence was higher than the maximum Guidelines sentence justified by the facts found by the jury. *Id.* at 380 n.6.

Similarly, in *United States v. Ameline*, 2005 WL 350811 (9th Cir. Feb. 10, 2005), the Ninth Circuit ruled that "we have no doubt" that the "substantial rights" prong of the plain error test was satisfied by the imposition of a sentence that "exceeded the maximum sentence under the Guidelines that was supported by [the defendant's] admission" as to the quantity of drugs he conspired to distribute. *Id.* at *5. The Ninth Circuit observed that "it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime." *Id.* at *6 (emphasis in original).

The Sixth Circuit, after an initial lack of clarity (*see United States v. Milan*, 2005 WL 309934, at *6 & n.3 (6th Cir. Feb. 10, 2005) (describing initial inconsistency)), has squarely aligned itself with the Fourth and Ninth Circuits. In *United States v. Milan*, the court expressly rejected the

respective approaches of the Second and Eleventh Circuits, 2005 WL 309934, at *6-*7, and found it "clear" that a sentence "longer than the maximum sentence authorized [under the Guidelines] by the facts [the defendant] admitted when he pled guilty" affects substantial rights within the meaning of the third plain-error prong. *Id.* at *5; *but cf. United States v. Barnett*, 2005 WL 357015, at *19-*20 (6th Cir. Feb. 16, 2005) (Boggs, C.J., concurring and dissenting) (advocating the approach adopted by the Eleventh Circuit in this case). And the Third Circuit, without detailed plain error reasoning, has broadly determined that cases raising *Booker* challenges should be remanded for resentencing, because such issues "are best determined by the District Court in the first instance." *United States v. Davis*, 2005 WL 334370, at *8 (3d Cir. Feb. 11, 2005); *see also, e.g., United States v. Tyree*, 2005 WL 375700, at *2 (3d Cir. Feb. 17, 2005) (unpublished decision).

Finally, the Second Circuit has adopted a third approach: asking the district court, in all instances, to determine whether the error at issue prejudiced the defendant. In *United States v. Crosby*, 2005 WL 240916 (2d Cir. Feb. 2, 2005), the Second Circuit ruled that the appropriate disposition "for pre-*Booker*/*Fanfan* sentences pending on direct review will be a remand to the district court, not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence." *Id.* at *11 (emphasis in original).[5] The Second Circuit applied its holding both to claims involving plain error and to any involving contentions of harmless error, explaining that resentencing will be appropriate when the district court determines that "under the post-*Booker*/*Fanfan* regime ... the original sentence would have differed in a nontrivial manner from that

[5] The *Crosby* panel made clear that it had issued its ruling only after receiving "numerous suggestions and comments" from "other judges of this Court." 2005 WL 240916, at *2.

imposed," because that determination "will demonstrate that the error in imposing the original sentence was harmful and satisfies plain error analysis." *Id.* at *12.[6] Two days later, on February 4, 2005, the Second Circuit issued an order noting that *Crosby* "set[] forth the procedure that the court will normally follow" with respect to the numerous appeals held pending *Booker*. The court attached a list of more than 200 pending appeals to which *Crosby* appeared to apply, and asked counsel in each case to specify whether the "appellant seeks a remand for consideration of whether resentencing should occur in light of" *Booker* and *Crosby*. *In re: Special Order of Inquiry to Appellants Regarding Remand Pursuant to* United States v. Crosby (2d Cir. Feb. 4, 2005).

II. THE ISSUE IN CONFLICT IS STARKLY PRESENTED BY THE PRESENT CASE

This case presents an excellent vehicle for the Court to consider whether the Sixth Amendment error recognized by *Booker* should be corrected on appellate review for plain error. First, there is no doubt that petitioner's constitutional rights were violated under *Booker*. There was no jury finding of drug quantity, and petitioner admitted at sentencing to transporting only 2,000 MDMA pills, for

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[6] In this respect, the Second Circuit's legal analysis is arguably closer to that of the First and Eleventh Circuits than to that of the Fourth, Sixth and Ninth Circuits. The latter three Circuits have focused the third-prong inquiry on whether the defendant's sentence would have been shorter under the Sentencing Guidelines but for enhancements unconstitutionally based on judge-made findings. *See, e.g.*, *Hughes*, 396 F.3d at 380; *Ameline*, 2005 WL 350811, at *5. The First, Second, and Eleventh Circuits, in contrast, have focused on the remedial portion of this Court's decision in *Booker*, and have asked, not whether the defendant's Guidelines sentence would have been shorter in the absence of unconstitutional judge-made findings, but rather whether the sentence would have been shorter "if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." Pet. App. 17a; *see Crosby*, 2005 WL 240916, at *12; *Antonakopoulos*, slip op. at 19-21. The Third Circuit has not addressed this issue.

which he could have received a maximum sentence of 78 months. The sentencing judge determined, however, by a preponderance of the evidence, that petitioner had possessed some 30,000 pills. Under the mandatory Guidelines system in place prior to *Booker*, this fact resulted in a sentencing range of 97 to 121 months' imprisonment. The district court sentenced Petitioner to 109 months' imprisonment, the exact center of the range, or 31 months (approximately 40%) more than the maximum sentence for which petitioner was eligible based on the admitted quantity of MDMA. There is therefore no doubt that, as the court of appeals summarized, "there was *Booker* error" here because, "[u]nder a mandatory guidelines system, Rodriguez's sentence was enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by the jury." Pet. App. 12a-13a. It is also undisputed that that error was "plain," within the meaning of the second prong of the plain error test. *See id.* at 13a.

Nor, unlike in some other cases, is there a concern that the case might be decided on an alternative ground that would prevent the Court from addressing the issue presented here. In two previous cases, *Johnson* and *Cotton*, this Court declined to address whether a particular misallocation of responsibility to a judge, rather than the jury, affected substantial rights under the third prong of the Court's test for plain error. In both cases, this Court avoided resolving that issue by ruling that the respective defendants had failed to carry their burden under the fourth, discretionary prong of the plain-error test—*i.e.*, whether the error seriously affected the "fairness, integrity or public reputation of judicial proceedings"—because the evidence of guilt in those cases was "overwhelming" and "essentially uncontroverted." *See Cotton*, 535 U.S. at 633; *Johnson*, 520 U.S. at 470. Here, in contrast, the evidence that petitioner possessed 30,000 tablets of MDMA was hotly contested and far from conclusive; indeed, it rested exclusively on the testimony of a cooperating witness whose credibility the Government

conceded was questionable. *Under these circumstances*, there can be no contention that the evidence supporting petitioner's sentence enhancement was "overwhelming" or "essentially uncontroverted."

Accordingly, the legal issue that has divided the courts of appeals is squarely presented here.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

Review by the Court is also warranted because the question presented is an issue of fundamental importance in an extraordinarily large number of cases.

In the most recent year for which statistics are available, approximately 64,000 criminal defendants were sentenced under the Guidelines. *See* United States Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* (hereinafter *2002 Sourcebook*) tbl. 2. Although the number of defendants sentenced in violation of *Blakely* and *Booker* cannot be definitively ascertained, it is necessarily—given the fact that Guidelines enhancements play a role in the vast majority of federal sentences—a very large number. To be sure, the question presented here arises only where the defendant failed to make a proper objection before the district court, but that is undoubtedly the situation in a very substantial number of cases, given that, prior to *Blakely*, every federal court of appeals to consider the issue had upheld the Guidelines in the face of a challenge under *Apprendi*. *See supra* note 4.

The recent order of the Second Circuit following its decision in *Crosby* highlights the number of affected cases. Following this Court's decision in *Blakely*, the Second Circuit withheld issuance of the mandate in numerous otherwise-decided cases potentially presenting *Blakely* issues; now, following its ruling in *Crosby*, *see supra* pp. 10-11, the court of appeals has issued an order addressed to appellants in all such cases requesting that they indicate

whether the defendant seeks a remand for sentencing reconsideration in accordance with *Crosby*. *See In re: Special Order of Inquiry*, *supra*. That order identifies more than 200 potentially-affected criminal appeals (although some of those cases may present harmless-error rather than plain-error issues), even without including cases still pending before the court. Given that the Second Circuit accounts for only about three percent of all sentencing appeals, *see 2002 Sourcebook* tbl. 55, these cases constitute only a small proportion of all affected cases nationwide.

It is hardly surprising, then, that in the mere weeks that have elapsed since the decision in *Booker*, numerous courts of appeals have addressed (and divided over) the question presented here. In addition, two Circuits, the Eighth and Tenth, have underscored the significance and the recurring nature of the issue by scheduling en banc arguments to address it in the first instance, bypassing panel review entirely. *See United States v. Gonzalez-Huerta*, No. 04-2045 (10th Cir.) (argument scheduled for Mar. 7, 2005); *United States v. Pirani*, No. 03-2871 (8th Cir.) (argument scheduled for Mar. 9, 2005).

It goes without saying, moreover, that the right at issue here is of substantial importance, as evidenced by the extraordinary attention devoted by this Court in recent years to the fundamental question of the allocation of factfinding responsibility between judge and jury. *See, e.g.*, *United States v. Booker*; *Blakely v. Washington*; *Harris v. United States*, 536 U.S. 545 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *United States v. Gaudin*, 515 U.S. 506 (1995).

No less important than questions about the scope of the underlying right are questions concerning which defendants already sentenced in violation of that right are entitled to invoke the protections of this Court's decisions. Indeed, the

Court has repeatedly recognized the need to resolve how its decisions in this area apply to defendants sentenced before the decisions were issued. For example, after *Apprendi*, the Court agreed to decide whether and how a sentence based on facts not charged in the indictment was subject to plain error analysis on appellate review. See *United States v. Cotton*, 535 U.S. 625. Similarly, the Court rapidly intervened to clarify the scope of the plain error doctrine in cases affected by its ruling in *United States v. Gaudin* that, in false statements prosecutions, the issue of materiality must be decided by a jury instead of a judge. *See Johnson v. United States*, 520 U.S. 461; *see also Schriro v. Summerlin*, 124 S. Ct. 2519 (2004) (deciding whether *Ring* applies retroactively to convictions that were already final when *Ring* was decided). The Court's intervention is likewise needed here to determine whether defendants concededly sentenced in violation of *Booker* may obtain relief on appeal.

Indeed, given the revolution wrought by *Blakely* and *Booker*, and the resulting large number of *Booker* plain error claims facing the circuit courts, that need is substantially *more* pressing than it was in *Cotton*, which involved only the relatively rare cases in which the sentence arguably exceeded a federal *statutory* maximum (principally, a small subset of narcotics cases), or *Johnson*, which involved only those cases in which a court mistakenly failed to submit an element of the offense to the jury.

IV. THE DECISION OF THE COURT OF APPEALS IS INCORRECT

This Court's review is also warranted because the court of appeals misapplied this Court's plain error precedents, in several ways.

1. Most fundamentally, the court of appeals misapplied the standard this Court has defined for what constitutes an effect on "substantial rights." The court at first correctly described the third prong of the plain error test—specifically, that in the absence of the error there would have been a

"reasonable probability" of a different result, "which means a probability 'sufficient to undermine confidence in the outcome.'" Pet. App. 13a (quoting *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004)); *see also id.* (effect on substantial rights shown where error "'affected the outcome'" of the proceedings) (quoting *Cotton*, 535 U.S. at 632). The court then erred, however, by placing dispositive weight on this Court's 1999 decision in *Jones v. United States*, 527 U.S. 373, reading *Jones* as mandating that it rule against the defendant when the defendant is unable to show affirmatively that a lower sentence would have been *more likely* than a higher one. Pet. App. 17a. Specifically, the court of appeals ruled that where "[t]he record provides no reason to believe any result is *more likely* than the other"—where "[w]e just don't know" what sentence the district court would have imposed in the absence of the error—the third prong of the plain error test is not satisfied. *Id.* (emphasis added).

This approach, requiring that an appellant affirmatively demonstrate that the result *would have been* more favorable to him, was specifically rejected last Term in *Dominguez Benitez*. In that case, this Court emphasized that the third-prong "reasonable probability" test is "*not* the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." 124 S. Ct. at 2340 n.9 (emphasis added). Rather, the defendant need only show that the prospect of a different result is "'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 2340 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

In the case of a district court mistakenly treating the Sentencing Guidelines as mandatory, it is impossible to see how the error, in the typical case, might somehow *not* "undermine confidence in the outcome." *Booker* requires judges to follow a vastly different sentencing process, in which the Sentencing Guidelines, no longer binding, are

merely one of several factors the judge must consider; in which judges must independently consider the seven factors (plus sub-factors) set forth in 18 U.S.C. § 3553(a); in which the judge may consider factors not previously deemed relevant by the Guidelines; and in which the judge ultimately has discretion as to what sentence to impose, subject only to the statutory minimum and maximum and appellate review for "reasonableness." In light of this revolutionary change, there clearly cannot be "confidence" that the "outcome" of a pre-*Booker* sentencing would have been the same under both the pre-*Booker* and post-*Booker* regimes.

Indeed, the Eleventh Circuit's own reasoning illustrates this point. The court of appeals repeatedly emphasized that "we don't know" or "[w]e just don't know" what would have happened if petitioner had been sentenced under the post-*Booker* regime, that the judge "might have given [petitioner] a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence," and that "[t]he record provides no reason to believe any result is more likely than the other." Pet. App. 17a. Unless the third-prong standard is to be revised—contrary to *Dominguez Benitez*, 124 S. Ct. at 2340 n.9—to require a showing that the result *would* have been more favorable to the appellant in the absence of error, this complete uncertainty as to what sentence petitioner would have received in the absence of error is, at a minimum, "sufficient to undermine confidence," *id.* at 2340 (internal quotation marks omitted), in the sentence imposed on petitioner under a mandatory view of the Guidelines.

Nor is there anything in *Jones* to the contrary. In *Jones*, this Court rejected a defendant's claim that his jury was induced to unanimously recommend the death penalty by jury instructions that allegedly might have caused the jury to believe that a lack of unanimity would result in a sentence shorter than life in prison. 527 U.S. at 384-96. The Eleventh Circuit seized on the statement in *Jones* that "[w]here the effect of an alleged error is so uncertain, a defendant cannot

meet his burden of showing that the error actually affected his substantial rights," *id.* at 394-95, reading it as establishing a principle that evidentiary equipoise on the consequences of an error necessarily requires affirmance of the sentence. But *Jones* establishes no such thing. First, the quoted language was not necessary to the decision in *Jones*; the Court had already ruled that Jones' claim of error "falls short of satisfying even the first requirement of the plain-error doctrine, for we cannot see that any error occurred." *Id.* at 390. Moreover, *Jones* was *not* a case in which there was equipoise. The Court made clear that the alleged error likely had *no* effect, because any potential effect "was allayed by the District Court's admonition that the jury should not concern itself with the effect of [its] recommendation," and "[t]he jurors are presumed to have followed these instructions." *Id.* at 394. *Jones* thus was not a case in which the error at issue left the appellate court completely unable to predict the result in the absence of error; it was a case in which it was doubtful whether the alleged error had any effect on the result *at all*.[7]

Furthermore, any possibility that *Jones* should be read as requiring an appellant to show that the result would likely have been different in the absence of error is definitively refuted by *Dominguez Benitez*'s holding that the appellant need *not* show by a preponderance that things "would have been different," and its reaffirmation that the required showing is merely one that "undermine[s] confidence" in the outcome. 124 S. Ct. at 2340 & n.9 (internal quotation marks omitted). Indeed, if there were any doubt about this point, the resulting tension between *Jones* and *Dominguez Benitez*

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[7] This error in the court of appeals' reading of *Jones* is evident in the court's transmogrification of *Jones*' qualified statement that there is no effect on substantial rights "[w]here the effect of an alleged error is *so* uncertain," 527 U.S. at 394-95 (emphasis added), into the unqualified (and erroneous) statement that *Jones* precludes finding the third prong satisfied where the effect of the error "is uncertain or indeterminate." Pet. App. 17a.

on this central aspect of the plain error test would provide yet another reason for this Court to grant certiorari.

2. The court of appeals also erred in focusing dispositively on the question whether petitioner's sentence would have been different under a discretionary sentencing system. As the Fourth, Sixth, and Ninth Circuits have expressly recognized, it suffices for a defendant to establish that his pre-*Booker* sentence under the Sentencing Guidelines would have been lower in the absence of unconstitutional judicial factfinding; the defendant need not also establish what might have happened if the sentencing judge had been given post-*Booker*-style discretion. *See, e.g.*, *Hughes*, 396 F.3d at 380 n.6. This is because the relevant error being analyzed for plain error purposes is *not* the district court's failure to anticipate the post-*Booker* discretionary system; it is the Sixth Amendment error of imposing an enhanced sentence under the Guidelines based on judicial factfinding. Thus, the court of appeals got things exactly backwards when it ruled, in addressing the third plain error prong, that "the constitutional error . . . is not the use of extra-verdict enhancements. . . . [T]he error is the mandatory nature of the guidelines once the guidelines range has been determined." Pet. App. 16a-17a.

Booker itself was clear about the nature of the Sixth Amendment right that was violated: "the defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment. . . . That right is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant'" *Booker*, 125 S. Ct. at 749. The separate determination by this Court to make the Guidelines advisory was a forward-looking remedy that does not change the nature of the fundamental Sixth Amendment error at issue. The Eleventh Circuit was therefore incorrect in analyzing the third prong by reference to an "error" consisting of the failure to treat the Guidelines as discretionary, and in finding it insufficient that petitioner's

sentence exceeded the maximum justified under the Guidelines by the facts found by the jury or admitted by petitioner.

3. Furthermore, even setting aside the two preceding points, the court of appeals' assessment of the likelihood of a lower sentence under a discretionary system is overly simplistic and devoid of analysis. There is reason to believe that it is *not* just as likely that a discretion-exercising judge would increase a sentence as decrease it. Data from the U.S. Sentencing Commission has shown that judges are more than 20 times as likely to grant downward departures as they are to grant upward departures. *See* U.S. Sentencing Commission, *2002 Sourcebook*, tbl. 26. To be sure, departure frequency is not an exact measure of what judges will do with their newfound discretion under *Booker*, since departures are not fully discretionary. It does suggest, however, that judges are significantly more inclined to exercise their discretion to reduce sentences rather than to increase them, and the post-*Booker* sentencing system will allow them to consider a wide array of mitigating factors not previously deemed relevant under the Guidelines.

4. Finally, even if none of the above factors made clear that a Sixth Amendment violation under *Booker* necessarily affects substantial rights, it would be appropriate—in light of the importance of the right at stake and the practical impossibility of making a case-by-case showing that a district judge, if given discretion, would have imposed a lighter sentence—either to presume an effect on substantial rights (or regard the error as "structural"), *see Olano*, 507 U.S. at 735, 739, or to require, as the Second Circuit did in *Crosby*, a remand to the district court for an informed determination of whether the error affected the defendant's sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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